Nos. 17-1717 & 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST SOCIETY, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST SOCIETY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local gov-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amici curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that counsel for all parties have filed letters granting blanket consent to the filing of *amicus* briefs.

ernments. It does so in part through extensive *amicus* briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The Government Finance Officers Association ("GFOA") is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

This case is of particular concern to state and local governments and their attorneys. Confusion among lower courts about who has standing to bring an Establishment Clause challenge, what test (or tests) govern those challenges, and how a given test or tests should be applied has made resolution of claims under the Establishment Clause unnecessarily taxing, costly, and contentious. *Amici*'s interest is *not* the advancement of any particular religious, sectarian, political, or ideological position. Its members hold a great diversity of beliefs about religion and its role in public life. What unites *amici* is a conviction that clear and predictable rules, not obscure and malleable standards, are necessary in this area.

SUMMARY OF ARGUMENT

Amici have a strong interest in the resolution of this case not only because it provides an opportunity to uphold the legality of this particular Memorial, but also to provide lower courts with a clear and generally applicable framework for resolution of such claims in the future. The need is great: Establishment

Clause litigation is often very burdensome and costly, and drawn-out legal contests often create occasions for the very sort of religious strife and rancor that the First Amendment was designed to prevent.

I. *Amici* submit that reaffirmation of this Court's Article III standing principles would ensure that those suing under the Establishment Clause have a real and personal stake in the matter. While this Court's earlier cases drew clear lines concerning the requirements of Article III in similar circumstances, this Court has not applied these same principles to a case involving a passive monument. Faced with this silence, many lower courts have abandoned clear lines in favor of standards that are indistinguishable from standards that this Court has rejected. The resulting jurisprudence offers little clear guidance, and instead requires counsel to navigate fine distinctions between, for example, "metaphysical" or "spiritual" harm, which is allegedly sufficient to create standing, and "psychological" injury, which is not. *Amici* therefore request that the Court reaffirm its clear and long-established standing principles by holding that an allegation of "unwelcome direct contact" with the Memorial is insufficient by itself to create standing to file a lawsuit seeking its removal, destruction, or disfigurement. Doing so will allow future litigants and courts to determine quickly and easily whether a plaintiff has satisfied the requirements of Article III and will ensure that federal courts do not insert themselves into politically charged matters where there is no case or controversy.

II. On the merits, *amici* respectfully submit that the Bladensburg World War I Veterans Memorial ("Memorial") does not violate the Establishment Clause, and, more broadly, that its constitutionality

should be assessed through clear and easily applied legal standards.

First, this Court should set forth a *single* test for assessing public displays under the Establishment Clause. In the area of passive monuments, decisions of this Court and the lower courts have not offered clear guidance and do not clearly identify how an alleged establishment of religion should be analyzed. Some decisions apply *Lemon* and its variants, others use the history-and-tradition approach exemplified by *Van Orden* and *Town of Greece*, and still others have tried to find some way of combining the two approaches. The outcomes vary widely, and there is a significant need, especially in the lower courts, for clarity as the current regime needlessly increases costs and uncertainty for all involved.

Second, the controlling standard should not depend on amorphous and malleable tests that serve to increase the likelihood of litigation and the costs associated with that litigation. For example, concepts such as "principal purpose" or "excessive entanglement" under the *Lemon* test have provided little concrete guidance for states and localities seeking to assess whether a public display is consistent with the Establishment Clause. Lawyers and judges must analogize to prior case law, but those cases often point "Janus-like" in different directions and send mixed signals about how a given display should be understood. *Van Orden* v. *Perry*, 545 U.S. 677, 683 (2005) (plurality op.). As a result, state and local governments with limited resources must address such claims without adequate guidance.

The *status quo* is unworkable. It is costly and time-consuming and it creates an environment conducive to public religious strife that the Establishment Clause was designed to prevent. *Amici* therefore re-

spectfully submit that this Court set forth a controlling standard that would provide bright lines for assessing what conduct violates the Establishment Clause, and what conduct does not. Clear and easily administrable standards would dissuade meritless claims from being brought and will reduce the need for litigation to resolve meritorious actions. Such clarity will permit counsel to provide advice to their clients about the constitutionality of proposed displays and enable them to judge how best to respond to challenges to existing displays.

ARGUMENT

I. THE COURT SHOULD ADOPT CLEAR RULES GOVERNING WHAT A PLAINTIFF MUST DEMONSTRATE TO SATISFY ARTICLE III STANDING.

Amici respectfully request that the Court apply its well-established standing doctrine to claims under the Establishment Clause. The Court has reaffirmed these principles in other contexts in recent years. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). This Court, however, has not defined their applicability to public-display cases arising under the Establishment Clause. This case presents a clear opportunity to do so. Respondents have alleged nothing more than their personal offense with respect to the Memorial. This psychological consequence should not suffice under the Court's precedent to create a "Case" or "Controversy" under Article III.

A federal court must assure itself that a plaintiff has standing before it can address the plaintiff's claims. See *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992); *Iuidice* v. *Vail*, 430 U.S. 327, 331 (1977). As explained in *Lujan*, "the Constitution's central mechanism of separation of powers depends

largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." 504 U.S. at 559-60. The Constitution identifies "'Cases' and 'Controversies'" as "'those disputes which are appropriately resolved through the judicial process.'" *Id.* at 560 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)). To opine on an issue in the absence of a case or controversy reduces federal courts to no more than "judicial versions of college debating forums." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). The Constitution did not intend the judiciary to be "a vehicle for the vindication of the value interests of concerned bystanders." *Allen* v. *Wright*, 468 U.S. 737, 756 (1984).[2]

A. The Court Has Clear Rules For Article III Standing Generally, But Not For Public Display Claims Specifically.

1. The Constitution vests "[t]he judicial Power" in the federal courts and grants them the power to decide "all Cases" and "Controversies." U.S. Const. art. III, § 2. This Court has implemented this requirement through decisions establishing what plaintiffs must satisfy to have standing to bring a case. See, *e.g.*, *Lujan*, 504 U.S. at 560. This "bedrock" principle ensures that federal courts abide by the cases-and-controversies limitation on their power and that only individuals who have suffered a cognizable injury

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[2] In each case, a federal court is "obliged to examine" the issue of standing, *Juidice*, 430 U.S. at 331, which is "a jurisdictional requirement which remains open to review at all stages of the litigation," *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 255 (1994); *see Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

may invoke the power of the federal courts to seek a remedy for a wrong. See *Valley Forge*, 454 U.S. at 471.

As this Court held in *Lujan*, the "irreducible constitutional minimum" for standing requires a plaintiff to establish (1) an injury in fact, (2) a causal connection between the injury and the complained-of conduct, and (3) a likelihood that a favorable decision will redress the injury. 504 U.S. at 560-61; see also *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion). These jurisdictional prerequisites to the exercise of a court's power ensure that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Instead, it requires courts to decide cases only if the plaintiff has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (emphasis omitted).

"First and foremost" among the standing requirements is the need to show an injury-in-fact. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The injury must be "a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent.'" *Id.* (quoting *Whitmore*, 495 U.S. at 155). This Court has explained that a concrete injury is one that "actually exist[s]," is "real," and is not "abstract." *Spokeo*, 136 S. Ct. at 1548. As a result, this Court has declined to expand the doctrine of standing in a manner that "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge*, 454 U.S. at 473 (quoting *SCRAP*, 412 U.S. at 687).

2. This Court has applied these principles in other Establishment Clause contexts. Most importantly, the Court held in *Valley Forge* that the plaintiffs lacked standing to sue when they read about a transfer of property from the federal government to a religious institution. The parties had "fail[ed] to identify any personal injury" suffered "*as a consequence* of the alleged constitutional error." 454 U.S. at 485. And their stating a belief "that the Constitution ha[d] been violated" could not suffice. *Id.* As the Court explained: "the psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86.

The Court distinguished the non-cognizable harm in *Valley Forge* from the cognizable harm in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963). There, the plaintiffs were schoolchildren and their parents in Pennsylvania and Maryland who challenged rules requiring daily Bible readings or the recitation of the Lord's Prayer at the beginning of the school day. *Id.* at 205-06, 211. Under the rules, the students could leave the classroom or elect not to participate. *Id.* at 208, 211-12. The Court explained that standing was satisfied because the families were "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9.

The Court in *Schempp* distinguished its facts from an earlier decision in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), which involved "the same substantive issues." 374 U.S. at 224 n.9. *Schempp* explained that the appeal in *Doremus* was "dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers." *Id.* In contrast, in *Schempp*, there

was standing under Article III because the laws at issue "require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners," *id.* at 224. Simply put, there was standing because "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley* Forge, 454 U.S. at 486 n.22.

3. The Court has not applied these principles in a case involving a challenge to a passive display. In a number of such cases, this Court has bypassed the analysis of Article III standing, while addressing the merits of those disputes.[3] Those prior decisions do not provide guidance on this issue because "[w]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974)).[4] More recently, in *Salazar* v. *Buono*, 559 U.S. 700 (2010), the United States argued that re-

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[3] *See, e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 681-82 (2005) (plurality opinion) (upholding monument displayed on Texas State Capitol grounds inscribed with the Ten Commandments without addressing standing); *id.* at 698 (Breyer, J., concurring in judgment); *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 862 (2005) (striking down Ten Commandments display without addressing standing); *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 587-88 (1989) (plurality opinion) (upholding menorah display but striking down crèche without addressing standing).

[4] *See also Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect."); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) ("The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us.").

spondent lacked Article III standing to challenge Congress' transfer of a cross and public land on which it stood to a private party. *Id.* at 711 (plurality opinion). A plurality of this Court, however, concluded that the procedural posture of that case precluded a full review of that issue. *Id.* at 711-12 (explaining that government could not contest standing because its failure to seek review rendered the lower court's judgment had become "final and unreviewable"). This case, in contrast, squarely presents that question.

B. The Court Should Adopt Clear Standards Governing Standing to Challenge Public Displays Under The Establishment Clause.

Amici submit that it is critically important that the Court should reaffirm that its Article III jurisprudence applies in the context of challenges to public displays. Under those standards, Respondents lack standing to request that federal courts order that the Memorial be removed, defaced, or destroyed.

1. Without clear guidance, the lower courts have created a substantial body of law that rests on an anomalous application of standing principles. For example, in the decision below, the court of appeals ruled that "in religious display cases, 'unwelcome direct contact with a religious display that appears to be endorsed by the state' is a sufficient injury to satisfy the standing inquiry." Pet. App. 10a (quoting *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)). Likewise, the Second Circuit has upheld standing when a plaintiff alleged that "he 'was made uncomfortable by direct contact with religious displays.'" *Jewish People for the Betterment of Westhampton Beach* v. *Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (per curiam) (quoting

Cooper v. *U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009)). In contrast, the Seventh Circuit requires plaintiffs to show that they were a captive audience or were required to take special burdens to avoid a display. *Doe* v. *Cty. of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994) ("Doe and Roe allege that they must come into direct and unwelcome contact with the sign in order to participate in their local government and fulfill their legal obligations.").[5]

There is a disconnect between the general Article III standards established by this Court, and the standards being applied by the lower courts to assess standing to advance a claim under the Establishment Clause. As to the former, in *Valley Forge*, this Court held that Article III requires a concrete injury over and above a complaint that the government is violating the law. Accordingly, "psychological" injury does not establish injury in fact. *Valley Forge*, 454 U.S. at 485-86. The second standard, applied by the Fourth Circuit and some of the other federal circuits, is that "unwelcome contact" with a religious display is enough to satisfy the "Case" or "Controversy" requirement of Article III. Pet. App. 10a-11a; see also *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1173 (11th Cir. 2018) (per curiam) ("[I]t is enough that [a plaintiff] claim to have suffered 'metaphysical' . . . injury and that his use of a public resource has been 'conditioned upon the acceptance of unwanted reli-

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[5] *See also ACLU-NJ* v. *Twp. of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (recognizing standing when the plaintiff "had personal contact with the display"); *ACLU Neb. Found.* v. *City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (requiring "only direct and unwelcome personal contact with the alleged establishment of religion"); *Newdow* v. *Lefevre*, 598 F.3d 638, 642-43 (9th Cir. 2010) (describing the standing threshold as "unwelcome direct contact").

gious symbolism.'"), *petition for cert. filed* (U.S. Sept. 18, 2018) (No. 18-351).

This *status quo* makes it difficult for state and local governments (and their lawyers) to advise their clients on the viability of a pending suit. As noted by Judge Newsom in a recent Eleventh Circuit decision: "Can it really be that, as *Valley Forge* clearly holds, 'psychological' harm is *not* sufficient to establish Article III injury in an Establishment Clause case, and yet somehow . . . 'metaphysical' and 'spiritual' harm *are*?" *Kondrat'yev*, 903 F.3d at 1176 (Newsom, J., concurring). A standard that "distinguish[es] between 'psychological' injury, on the one hand, and 'metaphysical' and 'spiritual' injury, on the other" has proven daunting to judges called upon to draw such fine distinctions. *Id.*

Moreover, the distinctions reflected in these lower court decisions are not merely academic. To the contrary, they govern the real-world question whether a state or locality can be compelled to litigate the merits of allegations in federal court challenging the existence of a newly adopted public display or a display that has stood undisturbed for decades. In this case, Article III governs whether plaintiffs have a sufficient stake to demand that a Memorial that has sat in the same location for over 90 years be eliminated.

Uncertainty concerning the governing standard undermines the rule of law. As this Court has explained: "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger* v. *Reservists Comm. to Stop the*

War, 418 U.S. 208, 222 (1974). Article III reflects that "federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487. Indeed, counsel representing states and localities must apply these standards in assessing how to respond to a federal complaint or the threat of a federal action. Such cases impose substantial costs on states and localities, not only in terms of time and resources, but also the risk of being responsible for the litigation costs of the Complainant. See 42 U.S.C. § 1988(b) (authorizing recovery by prevailing party of reasonable attorneys' fees).

2. Respondents lack standing under this Court's Article III jurisprudence. The court below concluded that Respondents had standing based on their allegation that they have "regularly encountered" the Memorial, "believe" its "display . . . amounts to governmental affiliation with Christianity," "are offended by" it, and "wish to have no further contact with it." Pet. App. 7a. According to the Fourth Circuit, this "'unwelcome direct contact with a religious display that appears to be endorsed by the state,'" "is a sufficient injury to satisfy the standing inquiry." *Id.* at 10a (quoting *Suhre*, 131 F.3d at 1086).

That holding is inconsistent with this Court's earlier standing cases. In particular, the *Valley Forge* Court held that a claim "that the Constitution has been violated" is not enough to confer standing; nor is a claim that a party has suffered "psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. The "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* at 483.

Likewise, Respondents' claimed injury falls far short of the concrete injury suffered by the plaintiffs in *Schempp*. There, the Court concluded that the laws under challenge—which required "reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison," 374 U.S. at 223—required "religious exercises . . . being conducted in direct violation of the rights of the appellees and petitioners," *id.* at 224. Here, Respondents have not alleged or shown that the Memorial forces them to partake in or abide any religious activity they would rather avoid or to undertake special burdens to avoid any compelled religious activity. Rather, Respondents have encountered the Memorial, at most, occasionally, while running errands or visiting commercial establishments or friends. See J.A. 29-30 (Complaint ¶ 6) (Mr. Lowe); *id.* at 30 (Complaint ¶ 9) (Mr. Edwords: "unwelcome contact" on "several occasions"); *id.* (Complaint ¶ 10) (Mr. McNeill: "unwelcome contact" "at least four times"). Sporadic contact by adult bystanders is a far cry from the injury that conferred standing on the schoolchildren in *Schempp* to invoke the protection of the Establishment Clause. 374 U.S. at 224 n.9; see also *Valley Forge*, 454 U.S. at 486 n.22.

* * * *

The Memorial has sat passively for over 90 years. It does not compel any religious activity, nor has it compelled respondents to undertake special burdens to avoid it. Respondents' claim to standing based on an "observation of conduct with which [they] disagree[]," *Valley Forge*, 454 U.S. at 485-86, is insufficient to satisfy the requirements of Article III.

II. THE COURT SHOULD CLARIFY WHAT STANDARD GOVERNS WHETHER A DISPLAY PASSES MUSTER UNDER THE FIRST AMENDMENT.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. Like the Roman god Janus, this Court's cases applying the Establishment Clause "point in two directions." *Van Orden*, 545 U.S. at 683 (plurality opinion). "One face looks toward the strong role played by religion and religious traditions throughout our Nation's history." *Id.* "The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Id.*[6] Consistent with these competing goals, "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious," because "[s]uch absolutism is not only inconsistent with our national traditions" but "would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (Breyer, J., concurring in judgment).

A. Establishment Clause Litigation Suffers From A Multiplicity Of Competing And Conflicting Standards.

With respect to the assessment of public displays, this Court has not spoken with a single voice in setting the standards that govern challenges to govern-

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[6] *Cf. Rowan Cty.* v. *Lund*, 138 S. Ct. 2564, 2564 (2018) (mem.) ("Sometimes our precedents focus on whether a 'reasonable observer' would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition.") (Thomas, J., dissenting from denial of certiorari).

mental conduct alleged to violate the Establishment Clause. As a result, the lower courts have applied competing and conflicting standards, which have made the litigation of such claims more difficult and expensive than necessary.

1. In *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989), this Court addressed the constitutionality of a crèche, menorah, and Christmas tree. The Court upheld the display of the menorah and Christmas tree, but struck down the display of the crèche. In doing so, the Court generated five separate opinions espousing both different standards and outcomes. Justice Blackmun's opinion applied *Lemon* v. *Kurtzman*, which requires that a statute or practice [1] "must have a secular purpose; . . . [2] must neither advance nor inhibit religion in its principal or primary effect; and [3] . . . must not foster an excessive entanglement with religion." *Id.* at 592. In turn, Justice O'Connor applied an "endorsement test," which asks whether a reasonable observer would perceive that "a challenged governmental practice conveys a message of endorsement of religion." *Id.* at 630 (O'Connor, J., concurring in part and concurring in judgment). And Justice Kennedy's opinion explained that "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662 (Kennedy, J., concurring in judgment in part and dissenting in part).[7]

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[7] *Cf. Lee* v. *Weisman*, 505 U.S. 577, 636 (1992) ("I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to 'requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.'") (Scalia, J, dissenting) (citation omitted) (quoting *Am. Jewish Congress* v. *Chicago*, 827 F.2d 120, 129 (7th Cir. 1987)).

More than fifteen years later, this Court addressed whether the public display of the Ten Commandments violated the Establishment Clause. *McCreary Cty.* v. *ACLU*, 545 U.S. 844 (2005); *Van Orden* v. *Perry*, 545 U.S. 677 (2005). Again, this Court did not reach agreement on a single standard or outcome. In *McCreary*, the Court adopted a "predominant purpose" standard, based on *Lemon* v. *Kurtzman*, to strike down the public display of the Ten Commandments in two county courthouses because their display reflected a "predominantly religious purpose." 545 U.S. at 881; see also *id.* at 883 (O'Connor, J., concurring) ("The purpose behind the counties' display . . . conveys an unmistakable message of endorsement to the reasonable observer.").

The same day, the Court rejected application of *Lemon* in *upholding* the display of the Ten Commandments on a monument located on the Texas State Capitol grounds. *Van Orden*, 545 U.S. at 686 (plurality opinion). The *Van Orden* plurality upheld the display because "such acknowledgements of the role played by the Ten Commandments in our Nation's heritage are common throughout America," *id.* at 688, whereas Justice Breyer upheld the monument after explaining that there was "no test-related substitute for the exercise of legal judgment." *Id.* at 700 (Breyer, J., concurring in judgment). Justice Thomas' concurring opinion suggested that the Establishment Clause's "text and history resis[t] incorporation against the States" such that it would have "no application . . . where only state action is at issue." *Id.* at 693 (internal quotation marks omitted).

2. These competing standards have filtered down to the decisions of the lower courts.

Several circuits—including the Second, Sixth, and Tenth Circuits—currently follow an analytical

framework similar to the Fourth Circuit's in this case. Sometimes referred to as applying the "*Lemon*/Endorsement test," these circuit courts apply the three-pronged approach in *Lemon* while giving "due consideration" to other tests articulated by this Court in *McCreary* and *Van Orden*. Thus, in *American Atheists, Inc.* v. *Port Authority of New York & New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit applied the three-part *Lemon* test to hold that "The Cross at Ground Zero" housed in the September 11 Museum did not violate the Establishment Clause. *Id.* at 238; *id.* at 234 ("The Cross at Ground Zero thus came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons."). Likewise, the Sixth Circuit, in *ACLU of Kentucky* v. *Grayson County*, 591 F.3d 837 (6th Cir. 2010), applied *Lemon* to uphold the constitutionality of including the Ten Commandments in a historical display at a county courthouse. *Id.* at 854. Finally, in *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010), the Tenth Circuit applied an amalgam of the *Lemon* test and Endorsement test to strike down roadside crosses memorializing fallen Utah state troopers under the Establishment Clause. *Id.* at 1117; *cf. id.* at 1110 ("Thus, the pattern is clear: we will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion.") (Gorsuch, J., dissenting from denial of rehearing en banc) (emphasis omitted).

At the same time, other courts have heeded *Van Orden*'s instruction that *Lemon* is "not useful in dealing with [this] sort of passive monument" and, instead follow the *Van Orden* plurality's historical analysis or evaluate displays under the "legal judgment" approach announced in Justice Breyer's con-

currence. For example, in *ACLU Nebraska Foundation* v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), the Eighth Circuit applied *Van Orden* to uphold the constitutionality of a Ten Commandments monument that stood in Plattsmouth's Memorial Park. *Id.* at 776. Like *Van Orden*, the Eighth Circuit relied on two principal factors to uphold the monument against a First Amendment challenge: first, the "City's monument ha[d] a dual significance, partaking of both religion and government," and second, "decades passed during which the Ten Commandments monument stood in Plattsmouth's Memorial Park without objection." *Id.* at 778; *id.* ("[W]e cannot conclude that Plattsmouth's display of a Ten Commandments monument is different in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*."); see also *Red River Freethinkers* v. *City of Fargo*, 764 F.3d 948, 950-51 (8th Cir. 2014) (upholding the constitutionality of a Ten Commandments monument sitting on the city's Civic Plaza based on the similarities between the monument and the monuments in *Van Orden* and *Plattsmouth*).

Finally, other courts have mixed-and-matched or chosen to apply multiple standards. In *Staley* v. *Harris County*, 461 F.3d 504, 505 (5th Cir. 2006), the Fifth Circuit applied an "'objective observer' analysis" based on its reading of *McCreary* and Justice Breyer's concurrence in *Van Orden*, to hold that a monument to a "prominent" citizen that featured an open Bible violated the Establishment Clause. *Id.* at 505-06. In turn, the Ninth Circuit has adopted a belt-and-suspenders approach, applying both *Lemon* and *Van Orden* to hold that a cross-shaped veteran's memorial built on public land was unconstitutional. *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1105-07 (9th Cir.

2011) (applying the "*Lemon* and *Van Orden* Frameworks"); see also Pet. App. 69a.

3. The practical impact of these competing standards on States, municipalities, and local governments that must respond to threatened claims and filed Complaints is substantial. To put the problem in proper perspective, throughout the country's fifty states and nearly 90,000 local governments, there are many hundreds of monuments, memorials, and other displays that have at least some religious significance.[8] Indeed, the decision below has called into question, without deciding, "the constitutionality of Arlington National Cemetery's display of Latin crosses." Pet. App. 26a n.16. Similar memorials and displays are scattered throughout the Nation. Pet. App. 101a (Niemeyer, J., dissenting from the denial of rehearing en banc).

Counsel must provide advice regarding whether a proposed display might be subject to challenge under the Establishment Clause, and whether that challenge is likely to succeed and/or is likely to result in the expenditure of significant resources in its defense, including the risk that plaintiffs may seek to recover reasonable attorneys' fees if they should prevail. 42 U.S.C. § 1988(b). In making these assessments, state and local governments lack unlimited resources, and must make value judgments concerning how best to expend those resources. Counsel who represent defendants such as state, municipal, and local governments must also provide legal counsel to their clients concerning their evaluations of allegations of an Es-

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[8] U.S. Census Bureau, CB12-161, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html.

tablishment Clause violation leveled against long-standing displays that may have historic or cultural significance to local citizens. Further, if litigation results, State and local governments must develop the case with a view to satisfying the controlling legal standard.

To be sure, *amici* recognize that "the Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984). Nevertheless, the multiplicity of competing standards greatly increases the time and expense necessary to provide meaningful advice and to litigate an Establishment Clause claim. The proliferation of different standards serves, as a practical matter, to make the defense of such claims more difficult, more costly, and more uncertain even in circumstances where, as here, the display has existed without controversy for multiple decades.

The absence of a settled, clear standard presents States and localities with an undue risk of expensive litigation if they choose to defend a new or long-standing display and thus exerts a pressure to capitulate even in instances of public displays that have been part of a local community's history for decades or more. *Cf. Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment) ("As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner).").[9] Like-

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[9] *See also* Pet. App. 94a ("Nearly a century ago, Maryland citizens, out of deep respect and gratitude, took on the daunting task of erecting a monument to mirror the measure of individual devotion and sacrifice these heroes had so nobly advanced.") (Gregory, C.J., dissenting from denial of rehearing en banc); *id.* at 96a ("I would let the cross remain and let those honored rest

wise, the absence of a single, clear standard makes it more difficult, politically and otherwise, to provide advice regarding a proposed public display or to evaluate settlement of a claim where an aggrieved party makes a strong showing of an Establishment Clause violation under one, but perhaps not all, of the relevant standards.

B. The Court Should Adopt A Single Standard For Assessing The Legality Of Public Displays Under The Establishment Clause.

Amici submit that the Court should adopt a single standard to govern the constitutionality of public displays under the Establishment Clause. In doing so, the Court should eschew malleable and indeterminate standards that promote uncertainty and thus encourage disputes and litigation. And, to the extent practicable, the Court should provide clear guidance to allow states and local governments to determine whether a proposed or existing display violates the Establishment Clause.

1. *Amici* submit that the Court expressly should abandon reliance upon *Lemon* v. *Kurtzman* in the context of public displays. As noted above, under *Lemon*, courts must assess whether a statute or practice (i) has a secular purpose, (ii) whether its "*principal* or *primary* effect" "neither advance[s] nor inhibit[s] religion," and (iii) "foster[s] an *excessive* entanglement with religion." *Allegheny Cty.*, 492 U.S. at 592 (emphases added).

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in peace.") (Wilkinson, J., dissenting from denial of rehearing en banc); *id.* at 97a ("The mothers of soldiers who died during World War I and other private citizens in Prince George's County, Maryland, erected a memorial almost 100 years ago commemorating the soldiers' service to the Nation.") (Niemeyer, J., dissenting from denial of rehearing en banc).

First, in *Van Orden*, a plurality of this Court explained that the *Lemon* test is "not useful in dealing with" an assessment of a "passive monument." 545 U.S. at 686 (plurality opinion). Likewise, Justice Breyer's opinion concurring in judgment did not apply *Lemon*. *Id.* at 700 (Breyer, J., concurring in judgment) (suggesting that application of *Lemon* "might well lead to the same result the Court reaches today"). Indeed, Justice Scalia noted more than 25 years ago that "*Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).[10]

Second, *Lemon* should be abandoned expressly because it has been applied only sporadically ever since it first was announced in the early 1970s. *Van Orden*, 545 U.S. at 686 (plurality opinion); see also, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (assessing whether challenge violates the Establishment Clause without applying *Lemon*); *Marsh* v. *Chambers*, 463 U.S. 783, 791 (1983) (same). Unless this Court expressly rejects *Lemon*, lower courts (and therefore States and localities appearing before those courts) will remain bound by its dictates and must assess its standards. Indeed, as this Court repeatedly has made clear, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the pre-

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[10] *Id.* ("Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.") (Scalia, J., concurring in judgment).

rogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *accord Tenet* v. *Doe*, 544 U.S. 1, 10-11 (2005); *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

As a result, lower courts and litigants will remain duty bound to apply its three-part test (i) when deciding whether to approve of or defend a public display, and (ii) when preparing the evidentiary record in a case involving a challenge to a public display. As discussed, the existence of multiple legal standards makes it more difficult and more expensive for State and local governments to comply with the obligations of the Establishment Clause. Rejection of *Lemon* would promote certainty and reduce unnecessary complexity in this critically important area.

Finally, the specific *Lemon* factors themselves are inherently malleable and therefore highlight the difficulty of advising and defending against an Establishment Clause challenge to a public display. For example, *Lemon*'s second prong asks not whether the effect of government action "promotes" or "inhibits" religion, but whether it is the "primary" or "principal" effect. Likewise, *Lemon* requires an analysis whether such government action touching on religious activity results not only in "entanglement" between the government and religion, but whether such "entanglement" is "excessive." These "how-much-is-too-much" factors are inherently indeterminate, and thus provide little comfort to counsel advising their clients in State, municipal, or local government regarding the legality of an existing or proposed public display or monument. What they know for sure is that if *Lemon* is the controlling standard, the risk of potential litigation that will sap scarce resources is a real and present danger.

2. Recognizing that the Court's Establishment Clause cases sometimes "point in two directions," *Van Orden*, 545 U.S. at 683 (plurality opinion), *amici* submit that all parties involved in litigation under the Establishment Clause would benefit from clarity regarding the appropriate legal standard. Admittedly, consensus regarding the appropriate scope and reach of the Establishment Clause has proved elusive. *E.g.*, *McCreary*, 545 U.S. at 850 (striking down Ten Commandments display); *Van Orden*, 545 U.S at 681 (plurality opinion) (upholding Ten Commandments display). Nevertheless, recent precedent underscores the importance of historical practice in evaluating challenges to government conduct under the Establishment Clause. See, *e.g.*, *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014).

In *Town of Greece*, this Court explained that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* (quoting *Allegheny Cty.*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). The Court reasoned that "[a] test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Id.* at 577. Indeed, Justice Kennedy's opinion for the Court, both concurring opinions, and Justice Kagan's dissent all agreed that history was a key analytical tool that must be applied to resolve claims under the Establishment Clause. See *Town of Greece*, 572 U.S. at 576-80; *id.* at 599-603 (Alito, J., concurring); *id.* at 608-610 (Thomas, J., concurring); *id.* at 621-23, 629 (Kagan, J., dissenting).

Public displays like the Memorial that have both secular and religious meanings are a long-standing part of American civic life, especially in cemeteries

and public parks. Arlington National Cemetery, for example, is home to numerous cross-shaped memorials, including the famous Argonne Cross, which was erected only two years after the Memorial in this case.[11] The National Park Service also hosts numerous sites that bear religious symbols, such as the Cape Henry Memorial Cross in Virginia, churches in the historical colony of Jamestown, and multiple Spanish missions in Texas's San Antonio Missions national historical park.[12] More generally, the influence of religion on our Nation is reflected in the names of cities across the country, from Saint Augustine, Florida, to Corpus Christi, Texas, to St. Louis, Missouri, and San Francisco, California.

An assessment of the Memorial's particular history supports its legality under the Establishment Clause. It was built using private funds to honor veterans from Prince George's County who died in World War I. The Memorial is one of several monuments in Veteran's Memorial Park, and, since its dedication, has been used to commemorate veterans' events. Like the display of the Ten Commandments upheld in *Van Orden*, the Memorial has, until this lawsuit, stood without challenge for decades in the community as part of "a broader moral and historical message reflective of a cultural heritage." 545 U.S. at 703 (Breyer, J., concurring in judgment); *id.* at 691-92 (plurality opinion) ("Texas has treated its Capitol

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[11] *See The Argonne Cross Memorial*, Am. Legion (Feb. 3, 2017), https://www.legion.org/memorials/235901/argonne-cross-memorial.

[12] *See Find a Park*, Nat'l Park Serv., https://www.nps.gov/index.htm (last updated Dec. 14, 2018); *see also Trylon of Freedom at the U.S. Courthouse in Washington, D.C.*, D.C. Mem'ls, http://www.dcmemorials.com/index_indiv0000342.htm (last updated Apr. 20, 2013).

grounds monuments as representing the several strands in the State's political and legal history."). The judgment of the Fourth Circuit should be reversed.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit should be reversed.

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